IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO. 6

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Appellants,

vs.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal From The United States District Court
For The District of Columbia

BRIEF OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE AS AN AMICUS CURIAE

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THE INTEREST OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

The League is a nationwide organization of shippers via all forms of transportation, including railroads, motor carriers, water carriers, and air carriers. The organization is dedicated to the promotion of sound economic transportation.

Broadly speaking, the League has an interest on behalf of its membership, as representative of the shipping public, in the principles and policies governing the regulation of

transportation. It is, therefore, concerned with the interpretation by the Courts and by the Interstate Commerce Commission of the provisions of the National Transportation Policy and the Interstate Commerce Act.

In particular, the League is concerned that the public need for adequate and competitive service by all modes of transportation shall be the paramount consideration in the determination of applications for motor carrier authority, and in the determination in a particular case, as to whether the needed highway transport service shall be performed by a railroad affiliated motor carrier.

In this case the Commission granted operating rights for motor transport service to a railroad owned motor carrier without attaching to the certificate any condition limiting the service to be performed to that which would be auxiliary or supplemental to the railroad service of the affiliated railroad. It is the contention of appellants that as a matter of law the proviso in 49 U.S.C. 5(2)(b) and the National Transportation Policy forbid such unrestricted certificates to rail affiliated motor carriers. The question thus presented, in which the League is interested, is as stated by appellants:

> 2. Whether, in any event, the Interstate Commerce Commission, in authorizing the performance of motor-carrier service by railroads or their affiliates, is required by the provisions of the Interstate Commerce Act and the National Transportation Policy to limit the motor service to be rendered to that which is auxiliary to or supplemental of the rail service of the parent railroad?

It is the position of the League that the Commission is not required by law to limit the motor service to be rendered by a railroad affiliate to that which is auxiliary to or supplemental of the rail service; and that the Commission has the power to authorize motor service by a railroad

affiliate without such limitation when it finds that such authorization is required by the present and future public convenience and necessity.

The League has no interest in the operating rights or ownership of any particular carrier and simply presumes in this case that the record supports the finding of public convenience and necessity for an unrestricted certificate. In doing so we rely upon the decision of the court below as to the sufficiency of the evidence on this record to support the order. On that issue this Court holds that the findings of the Commission may not be reversed if there is substantial evidence to support them. *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515.

We do not argue here the question whether the proviso of section 5(2)(b) constitutes a policy which affects the Commission's power under 49 U.S.C. 307 or whether the Commission has the power to impose restrictions on motor operations of railroad affiliates, either in acquisition cases under section 5 or in certificate cases under section 307. We believe those questions have been settled in the affirmative by this Court. *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60; *American Trucking Associations* v. *United States*, 326 U.S. 77; *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419; *United States* v. *Texas & Pacific Motor Transport Co.*, 340 U.S. 450.

ARGUMENT.

I.

THE STATUTE DOES NOT REQUIRE THE RESTRICTION OF RAILROAD AFFILIATED MOTOR CARRIER CERTIFICATES.

The proviso of section 5(2)(b) expresses no requirement as to the type of certificate, or the inclusion of restrictions thereto. It does require that the Commission shall not approve the acquisition of a motor carrier by a railroad unless it makes certain findings pertinent to railroad ownership of motor transport. The proviso says:

> *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

These provisions clearly specify the requisite findings to support an order authorizing such an acquisition. They do not specify or necessarily affect the terms of the order to be entered upon such findings when properly made.

A fundamental difference is involved here. For it is one thing to find that an acquisition will enable a railroad to use motor service to public advantage in its operations, as the proviso specifies; it is a wholly different thing to require that the acquired service be limited to the supplementing of rail service. We submit, therefore, that restrictions as to the service to be performed are not inflexibly required by the statute, even in acquisition cases.

In certificate cases under section 307, the policy of the 5(2)(b) proviso properly influences the Commission's determination as to public convenience and necessity. But in such cases the absence of explicit requirement for service restrictions is coupled with the fact that the proviso was never made directly applicable thereto. Its influence is only by implication. The contention of appellants is not supportable by mere implication and finds no basis in the words of the statute or in the regulatory scheme.

In this connection it should be noted that the power of the Commission to attach conditions and limitations to certificates is granted by 49 U.S.C. 308, for expressed purposes. The section is significantly silent as to the imposition of limitations to carry out the policy of the proviso in Section 5(2)(b). Since, therefore, the imposition of limitations under section 308 is discretionary even as to the specific subjects which the Congress enumerated for treatment by limitation, then *a fortiori* it cannot be reasonably contended that the law prescribes the imposition of a limitation pursuant to the proviso of section 5(2)(b).

II.

THE COMMISSION HAS CORRECTLY INTERPRETED THE LAW

In its administration of the statute, the Commission has always inquired into the public need for service as the paramount consideration in determining whether or not to restrict a rail affiliated motor carrier to auxiliary or supplemental rail service. *Interstate Transit Lines, Ext.—Verdon, Nebraska*, 10 M.C.C. 665, 667; *St. Andrews Bay Trans. Co., Extension of Operations*, 3 M.C.C. 711, 716; *Texas & Pac. Motor Transport Co., Ext.—Point Blue, La.*, 47 M.C.C. 425; *Rock Island Motor Transit Co., Ext.—Wellman, Iowa*, 31 M.C.C. 643.

The paramount public need has likewise been given effect by the Commission in acquisition cases under section 5, in determining whether a limiting restriction must be attached to the order. *Rock Island Motor Transit Co.—Purchase—White Line Motor Freight, Inc.*, 40 M.C.C. 457; and *Pacific Motor Trucking Company—Purchase—Lowinel Trucking Co.*, 60 M.C.C. 373.

We submit that the foregoing cases, among others, invalidate the argument of appellants that the Commission has recognized that it is powerless to issue unrestricted motor carrier authority to railroads, or that there is no valid precedent for the Commission's action in this case.

When there is public need for additional motor carrier service which other motor carriers will not or cannot meet, the Commission should have, and we submit that it does have, the authority to certificate a rail affiliated motor carrier to perform such service without restricting it to operations that are auxiliary to or supplemental of the rail operation. The rigid limitation upon the Commission's power which the appellants would read into the proviso of section 5(2)(b) would deny that power contrary to the public interest.

III.

THE CONGRESS HAS IMPLICITLY APPROVED THE COMMISSION'S AUTHORIZATION OF UNRESTRICTED MOTOR SERVICE BY A RAILROAD AFFILIATE.

A search of the legislative history surrounding the enactment of the proviso in section 5(2)(b), and of subsequent amendments to the law, reveals no clear expression as to the congressional intent with respect either to the Commission's power or to its alleged duty to restrict rail affiliated motor carrier service. The mere fact that

the statute has been extensively amended and the declaration of policy overhauled without the imposition of any express requirements for such limitation is indicative of congressional approval of the Commission's administration of the Act under the cases cited above.

Further proof of the complete lack of any congressional intent to impose a rigid limitation on the Commission's power is found in the legislative history surrounding the 1938 amendments to the original Motor Carrier Act. At that time the Congress was confronted with a proposal to make section 307 subject to the requirement of special findings as set forth in the 5(2)(b) proviso. This was on its face something less than a requirement prescribing restricted certificates, yet it was strongly supported by the appellant American Trucking Associations and just as vigorously opposed by the Association of American Railroads. *Hearings Before The Senate Sub-Committee on Interstate Commerce on S.* 3696, 3rd Sess., pp. 128-129; 157-164. The report of the sub-committee, which was adopted by the full Senate Committee, shows that the proposal was dropped as too controversial (Sen. Rep. 1650, 75th Cong., 3rd Sess., p. 3):

> Senator Shipstead introduced an amendment to S. 3606 which proposed to amend section 207(a) of the Motor Carrier Act, 1935, by requiring the same showing upon the application of a carrier other than a motor carrier to obtain a certificate of public convenience and necessity as is required by such carrier to obtain approval of the purchase or other acquisition of a motor carrier. At the hearings upon S. 3606, Senator Shipstead withdrew his amendment for the reason that it appeared that the amendment would provoke controversy and might delay the adoption of S. 3606.

If the amendment of section 207 [49 U.S.C. 307] was too controversial, then *a fortiori* an express requirement upon the Commission to restrict rail-owned motor carrier certificates was wholly outside congressional intent.

CONCLUSION.

The League prays that the Court will interpret 49 U.S.C. 307 and the National Transportation Policy to hold that it is within the discretion and power of the Commission, upon all the evidence to issue an unrestricted certificate to a railroad affiliated motor carrier whenever it finds that the issuance of such a certificate is required by the present and future public convenience and necessity.

Respectfully submitted,

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